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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1958

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Appellants,

vs.

COMMERCIAL TRANSPORT, INC., UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM

MACK STEPHENSON
208 East Adams Street
Springfield, Illinois
Counsel for Appellee, Commercial Transport, Inc.

ROBERT T. LAWLEY
MELVIN N. ROUTMAN
208 East Adams Street
Springfield, Illinois
Of Counsel

SCHNEPP & BARNES, PRINTERS, SPRINGFIELD, ILL.

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Appellee, Commercial Transport, Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and Decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal pursuant to 28 U.S.C.A. Section 1253 from the final judgment and decree entered on January 23, 1959, by a District Court of three judges specially constituted pursuant to 28 U.S.C.A. Sections 1336, 1398, 2284, 2321-2325, setting aside orders of the Interstate Commerce Commission, entered May 10, 1957, and October 3, 1957, in the case entitled *Commercial Transport, Inc., Extension—Illinois—Missouri*, Docket No. MC-104654 (Sub. No. 106), and remanding the case to the Interstate Commerce Commission for further proceeding. The opinion of the District Court is not yet reported in Federal Supplement.

On October 26, 1956, Commercial Transport, Inc., filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the transportation of cement, in bulk, in hopper vehicles, over irregular routes, between points in Illinois and Missouri. A hearing was held upon the application on January 8, 1957, before Joint Board No. 135. Three cement manufacturers and intervening rail carriers opposed this application. No motor carrier appeared. By order dated February 1, 1957, the Joint Board recommended approval of the application. Following exceptions and reply, Division 1 of the Commission denied the application in a report and order dated May 10, 1957. Application for reconsideration of this decision was denied by the entire Commission on October 3, 1957. Commercial Transport, Inc., brought this action in the United States District Court for the Eastern District of Illinois, seeking to have set aside the report and orders of the Commission denying the application. The appellant rail carriers intervened in

support of the Commission's decision. The United States, named as a defendant pursuant to 28 U.S.C.A. Section 2322, supported Commercial Transport, Inc., in requesting the District Court to annul and set aside the challenged orders. Briefs were submitted by all of the parties.

On November 14, 1958, the District Court heard argument presented by the respective parties, after which the matter was taken under advisement. On December 22, 1958, the District Court handed down its opinion, findings of fact and conclusions of law. The final order, granting the relief prayed for in the complaint, was entered on January 23, 1959.

Although the Interstate Commerce Commission defended its order in the District Court, it did not appeal from that Court's judgment.

ARGUMENT

The decision of the District Court is plainly correct, and appellants present no substantial question for the determination of this Court.

Appellants' question "Did the District Court erroneously substitute its judgment for the administrative determinations made by the Interstate Commerce Commission of issues of fact and law which are committed exclusively to the Commission?" (J. Stat. p. 3) is answered by the opinion of the District Court wherein it is stated (J. Stat. Appendix A pp. 21-22):

> While we should not substitute our judgment for that of the Commission, and though the Commission is not required to state a detailed explanation of its decision, nevertheless it is required that a sufficient reason be given by the Commission for the denial of the certificate to permit this Court to determine the basis for its action. *Chesapeake Motor Lines v. United States*, 1957, 153 F. Supp. 812. When the conclusion of the Commission that the applicant did not sustain its burden of proof and the reasons stated for that conclusion are analyzed in view of the National Transportation Policy it is clear the Commission failed to consider the advantages of the motor carrier service to the public.

This appraisement of the conclusion of the Commission in view of the National Transportation Policy, 49 U.S.C. Preceding Section 1, is consistent with the pronouncement of this Court in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 87-88:

> The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made

it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. *Dixie Carriers, Inc. v. United States*, 351 U.S. 56; *Eastern-Central Motor Carriers Assn. v. United States*, 321 U.S. 194; *McLean Trucking Co. v. United States*, 321 U.S. 67. Of course, the Commission possesses a "wide range of discretionary authority," in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *Interstate Commerce Commission v. Parker*, 326 U.S. 60. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.

Noting that the National Transportation Policy calls for the recognition and preservation of the "inherent advantages" of all modes of transportation, this Court held in the *Schaffer* case (355 U.S. at 89-90):

> When a motor carrier seeks to offer service where only rail transportation is presently authorized, the inherent advantages of the proposed service are a critical factor which the Commission must assess.

In its conclusion of law, No. 2 (J. Stat. Appendix B. p. 28), the District Court held that the Commission "failed to consider the critical factor, i.e., the advantages of motor carrier service to the public." In its finding of fact, No. 3 (J. Stat. Appendix B pp. 25-26), the District Court enu-

merated some of the advantages that motor transportation of bulk cement has over such transportation by rail:

(a) When shipped by rail, cement must be ordered prior to the day on which it is scheduled to be used, and in the event of rain, the number of carloads arriving at the point of destination accumulates. The result is that quantities of cement on hand exceed the space available for storage, thereby necessitating the payment of demurrage. If truck service were available, cement would be ordered when needed and the order cancelled in the event of rain.

(b) To utilize rail service a special switch or spur line, costing the consignee from $1,500 to $4,000, must be built at every job site. Except in instances where sand and gravel are shipped by rail instead of by truck, this expense would be eliminated by motor service which is "door-to-door." In every instance, the additional truck service from railhead to job site presently needed would be eliminated.

(c) Due to the volume of cement transported by rail and the sudden advent of winter weather, large quantities of cement are usually left over at the completion of a job. Motor carriage permits small amounts of cement to be carried with greater flexibility and would eliminate the loss presently incurred when it is necessary to dispose of this surplus cement locally, since it would become economically feasible to move this cement to new locations.

In attempting to remove the instant case from the force of the *Schaffer* decision, appellants assert that the proposed motor service would not be used even if it were authorized and allege that "the only shippers who appeared at the hearing opposed the application" (J. Stat. p. 3) and that "there is a total absence of shipper support"

(J. Stat. p. 3) for the application. Such assertions are at war with the record. The District Court correctly found that the application was supported at the hearing by Hefkin Company, Inc., a firm engaged in building highways in Missouri and Illinois, as well as by the Association of General Contractors of Illinois (J. Stat. Appendix B p. 25) an organization representing approximately 116 highway and general construction firms, and that the truck service would be used to supplement rail service (J. Stat. Appendix B p. 26). In *Indianhead Truck Line, Inc., Extension—Cement In Bulk,* No. MC-108449 (Sub. No. 41), the Commission recognized that supporting contractors were qualified to testify for a need for motor carrier service. The Commission said, at Sheets 9-10:

> The first question to be decided herein is the rail and cement mill companies' contentions that the supporting contractors do not control the carrier or type of carriage to be used in transporting the considered traffic, and therefore are not qualified to testify to a need for motor carrier service. These contractors purchase cement both on a delivered price basis and on an F.O.B. cement mill basis. They pay the freight charges either directly or by addition to their bills. Because of the lack of motor carrier service, they have had no choice of carrier, and the question of whether it is the mills or the consignees who control or are entitled to control the selection of the mode of transportation has not heretofore arisen. We are convinced, however, that the records amply establish that the supporting contractors and dealers are in a position to select and control the means of transportation to be employed, since the shipment is their property at the time it is transported.

The District Court specifically concluded that "the Commission did not find that it would be useless to issue the certificate for truck service because it would never be used,

but merely that the cement producers would not presently utilize the service." (J. Stat. Appendix B p. 28.)

Thus, the comprehensive findings of fact made by the District Court establish conclusively that the rationale of the *Schaffer* decision is clearly applicable to the instant case. After scrutiny of the record and findings, the District Court properly determined that the Commission, having failed to assess the "inherent advantages" of the proposed service, had not given consideration to all of the criteria which Congress has required to be taken into account, and the Court, therefore, properly set aside the orders of the Commission.

CONCLUSION

In answer to the complaint in the District Court, the United States of America admitted that the Commission failed to make proper findings as to the inherent advantages of the proposed mode of transportation and asked that the orders of the Commission be set aside and the matter remanded to the Commission to make proper findings in accordance with the National Transportation Policy. The District Court unanimously found that the Commission had not assessed the advantages of the proposed service in relation to the public need. The Commission did not appeal from the judgment and order of the District Court. The appellant railroad companies present no substantial question for the decision of this Court and the appeal lacks sufficient importance to warrant plenary consideration. Under such circumstances, the judgment and decree of the District Court should be affirmed without further argument.

Respectfully submitted,

MACK STEPHENSON
208 East Adams Street
Springfield, Illinois
Counsel for Appellee,
Commercial Transport, Inc.

ROBERT T. LAWLEY
MELVIN N. ROUTMAN
208 East Adams Street
Springfield, Illinois
Of Counsel